Supreme Court, U.S.
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No. 08-488

IN THE

Supreme Court of the United States

DARRYL BOWIE,

Petitioner,

v.

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA and RONALD SIMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a court-appointed receiver be sued as an employer under Title VII of the Civil Rights Act of 1964 for retaliatory employment decisions made during his receivership?

2. When a period of receivership ends during the pendency of a Title VII action, should the action continue with the original employer substituted for the receiver?

LIST OF PARTIES

There are no parties to the proceedings other than those listed in the caption.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, dated May 13, 2008, is unpublished. App. 1a. The Eleventh Circuit affirmed both the December 7, 2005 and October 29, 2007 decisions of the United States District Court for the Northern District of Alabama. App. 1a. The district court's order, dated December 7, 2005, granted Respondent Ronald Sims' Motion to Dismiss. App. 3a. The district court's order, dated October 29, 2007, granted Respondent Personnel Board of Jefferson County's Motion for Summary Judgment. App. 26a.

STATEMENT OF JURISDICTION

The district court's jurisdiction was invoked pursuant to 28 U.S.C. § § 1331, 1343. The United States District Court for the Northern District of Alabama entered an order on December 7, 2005, granting Respondent Ronald Sims' Motion to Dismiss and an order on October 29, 2007, granting Respondent Personnel Board for Jefferson County's Motion for Summary Judgment. The Petitioner timely filed a notice of appeal on November 5, 2007 to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit had jurisdiction to review the district court's order pursuant to 28 U.S.C. § 1291. On May 13, 2008, the Eleventh Circuit affirmed the district court's decisions. On July 11, 2008, the Eleventh Circuit denied the Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a), provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(b), provides:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(a), provides:

> The term "person" includes one or more individuals, governments, governmental

agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

STATEMENT OF THE CASE

On July 8, 2002, Respondent Ronald Sims was appointed as receiver to take control of the operations of the Personnel Board of Jefferson County, Alabama (hereinafter "the Board"). Doc. 25, Ex. B.[1] Sims was appointed receiver following a judicial finding that the Board was in violation of a 1981 consent decree aimed at remedying a history of discriminatory employment practices.[2] Doc. 25, Ex. B. The appointing court gave

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[1]These citations to the record refer to the record below as allowed pursuant to Sup.Ct. Rule 12.7. Citations are also made to the appendix to this Petition, where appropriate.

[2]*United States v. Jefferson County, Alabama, et al.*, Civil Action No. CV-75-S-666-S; *Ensley Branch of N.A.A.C.P. v. Seibels*, 616 F.2d 812 (5th Cir. 1980); *Birmingham Fire Fighters Ass'n 117 v. Jefferson County*, 280 F.3d 1289 (11th Cir. 2002); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994); *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989); *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1984); *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), *aff'g In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987).

Sims the "full power to direct, control, . . . the employees of the Board," including the power to hire, promote, demote, transfer and remove subordinates as necessary. Doc. 25, Ex. B, p. 2.

At the time Sims was appointed as the receiver, Petitioner Darryl Bowie, a Board employee, had a charge of discrimination pending with the Equal Employment Opportunity Commission ("EEOC") against the Board. Doc. 1. Bowie was instructed to drop his pending EEOC charge in order to be in good standing with Sims. Doc. 1. When Bowie declined, he was terminated. Doc. 1. On May 20, 2005, Bowie filed the instant complaint naming two defendants: the Board, Bowie's employer of 18 years; and Sims. Doc. 1. Bowie's complaint alleged, *inter alia*, retaliatory job termination in violation of 42 U.S.C. § 2000e, et al. (known as "Title VII") and 42 U.S.C. § 1981.[3] Doc. 1.

On or about July 11, 2005, the period of Sims' receivership ended and **the Board resumed control over its operations and employees.** On November

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[3]Title VII prohibits an employer from retaliating against an employee "because [the employee] has *made a charge*" of discrimination with the EEOC. 42 U.S.C. §§ 2000e-3(a) (emphasis added). When a litigant asserts claims under both Title VII and §§ 1981, the statutes "have the same requirements of proof and use the same analytical framework." *Anderson v. United Parcel Service, Inc.*, 248 Fed.Appx. 97, 99 (11th Cir. 2007)(quoting *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir.1998)); *Price v. M & H Valve Co.*, 177 Fed.Appx. 1, 11 (11th Cir. 2006)(The Eleventh Circuit applies cases from both bodies of law interchangeably).

14, 2005, Sims filed a Motion to Dismiss with the trial court, asserting, in part, that the Board was the proper defendant under Title VII because Sims was no longer serving as receiver. Doc. 9. On December 7, 2005, the district court dismissed Sims as a defendant, finding that the claims against Sims were "nothing more than claims against the Board as an entity." App. 31a. With regard to the Board, the district court stated that,

> Under Federal Rule of Civil Procedure 25(d), "[w]hen a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party." Fed.R.Civ.P. 25(d). Therefore, the Board – and not Sims in his official capacity – is the proper defendant in this case.

App. 32a. As a result, following the December 7, 2005 order dismissing Sims, the Board remained as the only defendant in the case. However, on April 6, 2007, the Board filed its own Motion for Summary Judgment, asserting that it could not be held liable for the employment decisions made during Sims' tenure as receiver because it had no authority or control over its operations or employees during that time. Doc. 23. On October 29, 2007, the district court entered an order granting summary judgment in favor of the Board. App. 3a. The district court opined that

> **the Board cannot be liable for the**

> **actions of Sims as receiver because the Board had been stripped of any right or ability to make decisions about *any aspect* of Bowie's employment with the Board during the relevant time period.**

App. 15a (bold-faced added).

Despite discussing Fed.R.Civ.P. 25(d) in its opinion, the district court refused to follow the automatic substitution rule to prevent abatement of Bowie's claims. Instead, the district court dismissed the only remaining defendant and left Bowie with no redress for his civil rights claims. However, in doing so, the district court recognized the problem its rulings had created.

> [T]he irony of such a result is not lost on this court – the very Order which appointed Sims as receiver in an attempt to remedy repeated violations of a long-standing Consent Decree (that requires compliance with anti-discrimination laws), may have actually paved the way for (1) Sims to receive immunity and (2) the Board (which had no authority to make any employment decisions regarding Board employees) not to be subject to liability for any discriminatory decisions by Sims (or his subordinates) which Plaintiff contends took place here.

App. 24a.

Bowie timely filed a Notice of Appeal on November 5, 2007, asking the United States Court of Appeals for the Eleventh Circuit to consider, among other issues, whether the district court erred in refusing to substitute the Board as Sims' successor when the receivership ended.

On May 13, 2008, the Eleventh Circuit issued a one paragraph opinion adopting the district court's decisions. App. 2a. On July 11, 2008, the Eleventh Circuit denied Bowie's Petition for Rehearing and Suggestion for Rehearing En Banc. App. 36a. This petition is filed within ninety (90) days of the latter ruling. Sup. Ct. R. 13.

REASONS FOR GRANTING THE WRIT

The district court's rulings below, which were affirmed by the Eleventh Circuit, conflict with decisions of this Court and other circuits which require substitution to prevent abatement of actions such as this one. The decisions also conflict with the plain language of Title VII in its definition of an "employer." The Civil Rights Act of 1964, and in particular Title VII, is a statute of great national importance and deserves more careful deference than it was given by the Eleventh Circuit's review in this case. Accordingly, the Petitioner requests that this Court grant the instant petition.

I. The Eleventh Circuit's Affirmance of the

District Court's Decision Declining to Follow Fed.R.Civ.P. 25(d) to Substitute the Board as the Receiver's Successor Conflicts with Decisions of this Court and Rulings of the Circuit Courts.

The Eleventh Circuit adopted the district court's October 29, 2007 decision allowing this action to abate when the receivership ended without applying Fed.R.Civ.P. 25(d) to automatically substitute the Board as Sims' successor. The Court of Appeals affirmed despite the district court's frank acknowledgment in its order that Rule 25(d) applies. App. 32a. The district court clearly had the obligation to substitute the Board for Sims as a defendant under Rule 25(d) to avoid abatement of Bowie's claims:

> [w]hen a public officer is a party to an action in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party.

Fed.R.Civ.P. 25(d).[4] The very purpose of Rule 25(d) is to avoid abatement of actions against officials when they are replaced in office. See *Acheson v. Fujiko Furusho*, 212 F.2d 284 (11th Cir. 1954). As the Advisory Committee Notes to Rule 25(d) explain,

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[4]The general term "public officer" comprises Federal, State, and local officers. Advisory Committee Notes to Fed.R.Civ.P. 25.

> The expression "in his official capacity" is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. . . .In general it will apply whenever effective relief would **call for corrective behavior by the one then having official status and power**, rather than one who has lost that status and power through ceasing to hold office.

Advisory Committee Notes, Fed.R.Civ.P. 25(d)(emphasis added). See *EEOC v. MacMillan Bloedel Containers Inc.*, 503 F.2d 1086 (6th Cir. 1974)(when relief involved seniority, reinstatement, or hiring, only a successor could provide relief, as the "primary concern is to provide the victim with full relief and such relief may be awarded against the successor"). Otherwise, the district court and the Eleventh Circuit must draw the untenable conclusion that the Board employees had no employer bound by Title VII during the period of the receivership, which is ultimately what they have done in this case.

Although the district court did not explicitly give a reason for declining to follow the mandates of Rule 25(d), the reason seems to be its opinion that "the Board cannot be liable for the actions of Sims as receiver because the Board has been stripped of any right or ability to make decisions." App. 15a. In other words,

according to the district court, the Board is not liable because it did not make the retaliatory decisions and had no control over Sims. The district court relied on an Alabama Supreme Court decision which actually supports Bowie's argument. In *Atlanta, B. & A.R. Co., et al. V. McGill*, 194 Ala. 186, 69 So. 874 (Ala. 1915), the Alabama Supreme Court held that, where the railroad which injured the plaintiff was in the hands of a receiver at the time of the accident, the receiver in his representative capacity, and not the railroad, was liable to the plaintiff. *Id.* (emphasis added). However, the Alabama court also held that the receiver's successor was liable in his representative capacity for personal injuries suffered through the negligent operation of the railroad while in the hands of the first receiver. *Id.* at 875.[5] The only distinction in Bowie's case is that the property was returned to the Board. The Board became Sims' successor and, therefore, the proper defendant against Bowie's claims.

This case warrants review by this Court, because the Eleventh Circuit's decision directly conflicts with precedent followed by other circuits complying with Rule 25(d) to prevent abatement of actions by automatic substitution when an official leaves office. See *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 6 (1st Cir. 2007)(New Secretary of the Treasury was automatically substituted for defendant sued in his

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[5]This ruling came before Rule 25 was adopted in 1937. Fed.R.Civ.P. 25.

official capacity as Secretary, under Fed.R.Civ.P. 25(d)(1)); *Terry v. Ashcroft,* 336 F.3d 128 (2d Cir. 2003)(New United States Attorney General who succeeded Janet Reno was automatically substituted as a defendant under Fed.R.Civ.P. 25(d)(1)); *Khodara Environmental, Inc. ex rel. Eagle Environmental L.P. v. Beckman,* 237 F.3d 186, 191 (3rd Cir. 2001)(newly appointed FAA Administrator was substituted as a defendant pursuant to Federal Rule of Civil Procedure 25(d)(1)); *Humphries v. Ozmint,* 397 F.3d 206, 209 (4th Cir. 2005)(new commissioner of the South Carolina Department of Corrections and new attorney general were automatically substituted as respondents under Fed.R.Civ.P. 25(d)(1)); *Masterson v. Barnhart,* 309 F.3d 267 (5th Cir. 2002)(new Commissioner of Social Security automatically substituted for the previous Commissioner pursuant to Fed.R.Civ.P. 25(d)(1)); *Chippewa Trading Co. v. Cox,* 365 F.3d 538, 541 (6th Cir. 2004)(authority to "substitute the new official who succeeds to the relevant responsibilities of a former official who was a party has long been recognized under Fed.R.Civ.P. 25(d), the . . . rule that governs the automatic substitution of public officials in proceedings in the federal district courts); *Bunn v. Conley,* 309 F.3d 1002, 1009 (7th Cir. 2002)(both the district court and the circuit court, by operation of law, substituted each of the new wardens as defendants under Fed. R. Civ. P. 25(d)(1)); *Wishnatsky v. Rovner,* 433 F.3d 608, 610 (8th Cir. 2006)(action seeking relief against University of North Dakota Clinic director in her official capacity continues automatically against her successor in office under Fed.R.Civ.P. 25(d)); *Gilmore v. Gonzales,* 435 F.3d 1125, 1129 (9th Cir. 2006)(Director of the FBI, Secretary of

Transportation and others, sued in their official capacities, were substituted with the current federal officers pursuant to Fed.R.Civ.P. 25(d)(1)); *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1242 (10th Cir. 2005)(automatic substitution of two newly-elected city council members for their predecessors under Fed.R.Civ.P. 25(d)(1)); *Alabama-Tombigbee Rivers Coalition v. Norton*, 338 F.3d 1244, 1246 (11th Cir. 2003)(successor to the Secretary of the U.S. Department of the Interior named as a defendant was automatically substituted as a defendant under Fed.R.Civ.P. 25(d)(1)); *Griffith v. Lanier*, 521 F.3d 398, 399 (D.C. Cir. 2008)(Complaint seeking injunctive relief as well as money damages against a defendant "acting in his official capacity" as chief of police was properly construed as naming defendant in his official capacity, and therefore his successor was automatically substituted as defendant upon taking office).

The Eleventh Circuit's decision improperly changes the law of the circuit which recognizes automatic substitution even in the absence of direct liability of the successor. In *Scott v. Taylor*,405 F.3d 1251, 1253 (11th Cir. 2005), the plaintiff filed a discrimination complaint against, among others, Georgia's Speaker of the House, Tom Murphy. When Murphy ceased to hold that office, he was automatically substituted with Glen Richardson, his successor. *Id.* There were **no allegations of wrongdoing** on the part of Richardson individually, who was not in office at the time of the alleged discrimination. *Id.* Nevertheless, the plaintiff in that case was **allowed to maintain her claims** against Richardson as the

current official under Rule 25(d). *Id.*

Certainly any injunctive relief that is awarded can only be provided by the Board, the entity that resumed control of employment operations when Sims' receivership ended. Hence, it is not an issue of whether the Board made the allegedly retaliatory employment decisions in this case, but the fact that the Board is now the entity responsible for providing a remedy for said retaliation.

The Eleventh Circuit's decision also directly conflicts with both the decisions of this Court and with decisions of the Sixth Circuit Court of Appeals, which address **automatic substitution in situations involving receivers**.[6]

In *Texas and Pacific Railway Co. v. Johnson*, 151 U.S. 81, 14 S.Ct. 250, 38 L.Ed. 81 (1894), the Plaintiffs brought a tort claim against the receiver of the railroad who ultimately returned the railroad property to the railroad, just as the receiver in this case returned the control of the Board to its members. 151 U.S. 81, 14 S.Ct. 250. This Court held in *Johnson* that the plaintiffs could pursue their claim against the successor in interest to the receiver:

That a suit in a state court for damages

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[6]See *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964)(granting *certiorari* because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts").

> for personal injuries caused by the negligent operation of the Texas & Pacific Railway **while in the hands of a receiver could be maintained against the railway company after its property was restored to it.**

Johnson, 14 S.Ct. at 254 (emphasis added); See *Texas & P. R. Co. v. Overheiser*, 151 U.S. 105, 14 S. Ct. 259, 38 L. Ed. 90, (1894)(a similar situation arose as to the same receiver, and was considered in the same way).[7]

The Sixth Circuit Court of Appeals has addressed this issue, as it relates to an employment discrimination suit like the one presently being addressed to this Court. *Rowser v. Miller*, 631 F.2d 433 (6th Cir. 1980)(a § 1981 case) involved the dismissal of a discrimination complaint brought by the plaintiffs who were employees of a hotel while it was under a

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[7]Several state courts have held similarly in situations involving receivers. See *Production Credit Ass'n of Lancaster v. Schweiss*, 421 N.W.2d 116 (Wis.App., 1988)(A receiver may be discharged by order of the court, but the discharge does not necessarily bar a claim against the successor in interest to the property held by the receiver); *Missouri, K. & T. R. Co. v. Chilton*, 27 S.W. 272 (Tex. Civ. App. 1894)(the court held inferentially that a pending action against the receivers abated upon their discharge, and affirmed a judgment in their favor and against the railroad company, to which the property had been returned); *Stuart v. Dickinson*, 235 S.W. 446, (Mo. 1921)(where an action was brought against both the company in receivership and the receiver and, prior to trial, the property was turned back and the receiver discharged, and judgment was upheld against the company).

receivership. *Id.* During the pendency of the appeal, the receivership was terminated. *Id.* at 434. The defendant then argued on appeal that the dissolution of the receivership rendered the controversy moot because only the receiver had been sued and no defendant remained. *Id.* The Sixth Circuit held otherwise in a well-reasoned opinion:

> The controversy between the parties is not genuinely moot in the sense that the dispute has been resolved either by settlement or by a set of events that makes the Plaintiffs' claim no longer a live issue or controversy. In short, the plaintiffs still want their money and their moral satisfaction, and have not gotten either.

Id.[8] Furthermore, in *EEOC v. MacMillan Bloedel Containers, Inc.*, the Sixth Circuit ruled that Title VII mandates the application of the successor doctrine. 503 F.2d 1086 (considerations set forth by the Supreme Court as justifying a successor doctrine under the NLRA are equally applicable to Title VII cases). See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973); *Howard Johnson Co.*

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[8]The court in *Rowser* remanded the case for a determination of whether the purchaser of the hotel took the assets subject to a Title VII discrimination claim. The only distinction, though not relevant to the issue before this Court, is that the property was not returned to the original owner after the receivership ended, as it was in Bowie's case.

v. Detroit Local Joint Executive Board, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974).

Even in cases where a separate entity purchased the assets from the receiver or from the original owner directly, courts have routinely held that successor liability applies. *Trujillo v Longhorn Mfg. Co.*, 694 F2d 221 (10th Cir. 1982)(Title VII and § 1981); *Dominguez v. Hotel, Motel, Restaurant & Miscellaneous Bartenders Union*, 674 F2d 732 (8th Cir. 1982)(Title VII).[9]

Contrary to these rulings, the district court dismissed the only remaining defendant after Sims' receivership had ended, instead of allowing automatic substitution of the Board as Sims' successor. This issue needs to be examined because, before now, this Court has not addressed the specific situation where a receiver is accused of retaliation under Title VII during his receivership, the receivership ends during the pendency of the lawsuit, and control is returned to the original

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[9]The same basic principle is applied in bankruptcy cases involving trustees. The Illinois Bankruptcy Court, has held that a receiver may be sued and held liable in his official receiver capacity and that official capacity suits against a receivership may be initiated without leave of such court. *See* 735 Ill. Comp. Stat. 5/2-415(c) (2004). *In re Teknek, LLC*, 343 B.R. 850, 875-76 (Bkrtcy.N.D.Ill. 2006). In the Seventh Circuit, the same applies to bankruptcy trustees. *Cable v. Ivy Tech State College*, 200 F.3d 467, 475 (7th Cir. 1999)(recognizes that Rule 25, which applies to bankruptcy proceedings, also provides for automatic substitution of public officers who sue in their official capacity, as well as Bankruptcy Rule 2012(b) provides for automatic substitution of a successor trustee when a trustee ceases to hold office "in any pending action, proceeding or matter.")

employer.[10]

II. The Eleventh Circuit's Affirmance of the District Court's Decision that Sims Was Not an Employer Under Title VII Directly Conflicts with the Plain Language of the Statute.

Without the benefit of reasoned analysis and with little regard for the plain language of the statute, the Eleventh Circuit adopted the lower court's decision that a court-appointed receiver is **not an employer** under Title VII. The Eleventh Circuit's decision creates a square and irreconcilable conflict with the plain language of Title VII that must be addressed by this Court. *Dawson Chemical Co. v. Rohn & Haas Co.*, 448 U.S. 176 (1980)(*certiorari* granted "to forestall a possible conflict in the lower courts" on an "important" issue even though there was no "direct conflict" among various district court and court of appeals opinions).

The district court's December 7, 2005 initial order dismissed Sims based on the district court's opinion that Sims was not Bowie's employer under Title VII, but was a redundant party defendant. App. 31a. The district court held that "there is no distinction between Sims as 'Receiver,' Sims as 'Agent of the Court,'

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[10]See *Taylor v. Sturgell*, 128 S.Ct. 2161, 2171 (2008); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 1411 (1978)(considering issue of first impression); *Mu'Min v. Virginia*, 500 U.S. 415, 439, 111 S.Ct. 1899, 1912-13 (1991)(reviewing issue of first impression).

and Sims as 'the Board.'" App. 31a. In other words, in the district court's opinion, the Board was the employer and Sims was an agent acting on behalf of the Board, therefore, only the Board could be considered the "employer."[11] This rationale directly conflicts with **the plain language of Title VII declaring that a receiver is an employer under the statute**. Under the plain language of Title VII, an "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). A "person" is then defined as "one or more individuals, governments . . . trustees, trustees in cases under Title II, or **receivers**." 42 U.S.C. § 2000e(a)(emphasis added).

There is no ambiguity in this language and no need for statutory construction. When a court is called upon to construe a statute, the court must begin with the language of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, 122 S.Ct. 941, 950 (2002).

> The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117

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[11]Title VII actions are not properly brought against individuals, but instead against the employer. *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1060 (11th Cir. 1992); *see also Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) ("The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act.").

> S.Ct. 843, 136 L.Ed.2d 808 (1997)(citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). The inquiry ceases "if the statutory language is unambiguous."

Robinson, 519 U.S. at 340. Here, Title VII plainly includes receivers in its definition of "employer." There is no room for the district court to construe the statute otherwise. Courts must not be permitted to "undo the work of Congress . . . " *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 459 (6th Cir. 1999). However, by rejecting the plain language of Title VII and not holding Sims as an employer in this case, the district court has done just that.

This rationale also ignores the undisputed fact that Sims was acting ***in place of*** the Board, which no longer had any authority or control over its business. It is irrefutable that Sims was the only person acting as an employer during his receivership. It is undisputed that, in accordance with the order appointing Sims as receiver, Sims was the sole decision-maker who implemented the decisions about which Bowie complains in this case. Nevertheless, the district court dismissed Sims, reasoning that the claims against him "amount to nothing more than claims against the Board as an entity." App. 31a.

This reasoning is flawed in several ways. First, it ignores Title VII's definition of an "employer" as explained above. Second, not only did the appointing

court give Sims the "full power to direct, control, operate, manage and administer . . . the employees of the Board" during his tenure as receiver, but he was specifically given "all powers vested . . . in the three members of the Board and Personnel Director, including the power to hire, promote, demote, transfer and remove subordinates as necessary.[12] (Doc. 25, Ex. B, p. 2). Third, the district court's reasoning ignores the fact that the Board had "no authority to make any employment decisions regarding board employees" during the receivership (Doc. 30, p. 15). This fact was acknowledged by the district court in its October 29, 2007 order. App. 3a. Nevertheless, the court took the incongruous position that Sims was the same as the Board and only the Board could be the employer.

Taken together, the district court's two opinions mean that Jefferson County Personnel Board employees had no real employer and were not covered by Title VII during the period of receivership, **despite the fact that the receiver was by definition an employer under Title VII.** Thus, the district court's ruling directly contradicts Title VII by dismissing Sims as a defendant when, under the plain language of Title VII, he was the "employer" and subject to liability under the statute during the period of receivership.

Although it would have been proper to dismiss

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[12]Again, Bowie's alleged in his employment discrimination complaint that he was terminated and Sims' position is that he terminated Bowie as part of an alleged reduction in force.

Sims as a defendant when his receivership ended, provided the Board was substituted in his place, Sims' underlying liability as Bowie's employer during the receivership must be established. By dismissing Sims as an improper or redundant party and later dismissing the Board as not responsible for Sims' retaliatory conduct, the district court left Bowie with no Title VII defendant at all.

III. This Case Presents an Issue of Great National Importance and Deserves Immediate Review as the Eleventh Circuit's Decision Effectively Suspends Title VII's Protection Against Employment Discrimination During a Period of Receivership

It is necessary that this Court review this case because the Eleventh Circuit's decision paves the way for receivers, performing in the capacity of an employer as anticipated by Title VII, to completely avoid liability for retaliation in violation of Title VII. The lower court's decision also paves the way for an employer, all respects otherwise responsible for obedience to Title VII's statutory strictures, to escape responsibility for any Title VII violation occurring during a receivership -- a result especially offensive where, as here, the receivership is imposed by a court order to correct continuing noncompliance with a consent decree which sought to remedy a long history of discriminatory employment practices.

The lower court's decision effectively overturns,

by judicial fiat, an act of Congress passed based on a rich legislative history and a wealth of judicial interpretation and application. By dismissing both of the defendants in this case and declaring that Bowie had no Title VII employer, the district court has effectively suspended protection under Title VII for Board employees during the receivership. This latter proposition irrefutably contradicts the plain language of Title VII.

A covered employee should not be deprived of Title VII protection simply because a court replaces his employer with a receiver. This is a result Congress certainly did not intend as Title VII is meant to eliminate, rather than enable workplace discrimination and retaliation. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)("The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities").

The practical consequence of this holding is that every employee whose employer has been placed in receivership, is subject to the whims of the receiver as the new employer under Title VII with no recourse for Title VII violations that may occur. This unfair consequence is even more glaring in cases like the one before this Court, where the purpose of the court-appointed receiver was to end the continuing discriminatory employment actions of the original employer. The district court recognized this dilemma, stating that, "the very Order which appointed Sims as receiver in an attempt to remedy repeated violations of a long-standing Consent Decree . . . may have actually

paved the way for [Sims and the Board] not to be subject to liability for any discriminatory decisions by Sims." App. 24a.

Already, two employees of the Jefferson County Personnel Board have had their Title VII cases dismissed because their claims arose during Sims' receivership. (*Darryl Bowie v. Ronald Sims & Personnel Board of Jefferson County, Alabama*, CV-05-RDP-1050-S; *Sandra Henry v. Personnel Board of Jefferson County, Alabama*, CV-05-RDP-1788-S). If the Eleventh Circuit's decision is allowed to stand, the same will hold true for at least two other employees who have cases currently pending against the Board in the district court. (*Barbara Carmichael & Joyce Smith, v. Personnel Board of Jefferson County, Alabama*, CV-05-B-2371-S).

The Civil Rights Act, and specifically Title VII, is a statute of great national importance and deserves more careful review than it was given by the Eleventh Circuit's action in this case. The district court judge rejected the mandates of Title VII by ruling (in direct contradiction with the plain language of the statute) that a receiver is not an employer liable under Title VII. By dismissing both of the defendants in this case, the district court has exceeded its judicial power by effectively suspending protection under Title VII for Board employees during Sims' receivership.

The failure to hold a successor employer liable for the retaliatory practices of its predecessor "could emasculate the relief provisions of Title VII by leaving

the victim of discrimination without a remedy." *MacMillan Bloedel*, 503 F.2d at 1086. This is an unacceptable result that abrogates Title VII by inappropriate judicial fiat. Accordingly, the Petitioner requests that this Court grant this petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 13, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-15267
Non-Argument Calendar

D.C. Docket No. 05-01050-CV-2-RDP

DARRYL BOWIE,

Plaintiff-Appellant,

versus

RONALD SIMS, individually and in his official capacity as the Receiver for the Personnel Board of Jefferson County, PERSONNEL BOARD OF JEFFERSON COUNTY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

(May 13, 2008)

Before BIRCH, HULL and WILSON, Circuit Judges.

Appendix A

PER CURIAM:

Darryl Bowie filed this action against Ronald Sims and the Personnel Board of Jefferson County (the "Board"), alleging employment discrimination in violation of Title VII and 42 U.S.C. §§ 1981 & 1983. He appeals the district court's dismissal of his claims against Sims and its order granting summary judgment in favor of the Board. After review, we affirm for the reasons set forth in the District Court's Memorandum Opinions of December 7, 2005 and October 29, 2007.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED OCTOBER 29, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CASE NO. 2:05-cv-1050-RDP

DARRYL BOWIE,

Plaintiff,

v.

PERSONNEL BOARD OF JEFFERSON COUNTY,

Defendant.

MEMORANDUM OPINION

The court has before it Defendant Personnel Board of Jefferson County's (the "Board") Motion for Summary Judgment (Doc. # 23) filed April 6, 2007. The motion has been fully briefed and was deemed submitted, without oral argument, as of April 25, 2007. Defendant's motion addresses only the limited – yet dispositive – issue of Board liability for the actions about which Plaintiff complains; the parties have agreed that the court should rule on the issue of Board liability as a threshold matter before the parties address the merits

of Plaintiff's claims. For the reasons outlined below, the court finds that the motion for summary judgment is due to be granted.

I. Legal Standards for Evaluating a Summary Judgment Motion

Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R .CIV. P. 56(c). The substantive law will identify which facts are material and which are irrelevant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the nonmovant. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See id.* at 249. The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *See id.* at 324.

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The method used by the party moving for summary judgment to discharge its initial burden on the motion depends on whether that party bears the burden of proof on the issue at trial. *See Fitzpatrick*, 2 F.3d at 1115-17 (citing *United States v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991) (en banc)). If the moving party bears the burden of proof at trial, then it can only meet its initial burden on summary judgment by coming forward with positive evidence demonstrating the absence of a genuine issue of material fact; *i.e.*, facts that would entitle it to a directed verdict if not controverted at trial. *See Fitzpatrick*, 2 F.3d at 1115. Once the moving party makes such a showing, the burden shifts to the non-moving party to produce significant, probative evidence demonstrating a genuine issue for trial.

If the moving party does not bear the burden of proof at trial, it can satisfy its initial burden on summary judgment in either of two ways. First, the moving party may produce affirmative evidence negating a material fact, thus demonstrating that the non-moving party will be unable to prove its case at trial. Once the moving party satisfies its burden using this method, the non-moving party must respond with positive evidence sufficient to resist a motion for directed verdict at trial.

The second method by which the moving party who does not bear the burden of proof at trial can satisfy its initial burden on summary judgment is to affirmatively show the absence of evidence in the record to support a judgment for the non-moving party on the issue in

question. This method requires more than a simple statement that the non-moving party cannot meet its burden at trial. But it does not require evidence negating the non-movant's claim; it simply requires that the movant point out to the district court that there is an absence of evidence to support the non-moving party's case. *See Fitzpatrick*, 2 F.3d at 1115-16. If the movant meets its initial burden by using this second method, the non-moving party may either point out to the court record evidence, overlooked or ignored by the movant, sufficient to withstand a directed verdict, or the non-moving party may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. However, when responding, the non-movant can no longer rest on mere allegations, but must set forth evidence of specific facts. *See Lewis v. Casey*, 518 U.S. 343, 358 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

II. Relevant Undisputed Facts[1]

On July 8, 2002, after having found the Jefferson County Personnel Board (the "Board") in civil contempt for failing to comply with various court orders, the Honorable Judge Lynwood Smith of the United States District Court for the Northern District of Alabama entered an order appointing Ronald R. Sims, Ph.D., as

1. If facts are in dispute, they are stated in the manner most favorable to Plaintiff. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). However, when applicable, the court has noted what facts are in dispute.

Receiver of the Board. *(United States v. Jefferson County,* 2:75-CV-666-CLS, Doc. # 935 (N.D.Ala. July 8, 2002) (the "Order" or "Judge Smith's Order"). Pursuant to the Order, Sims received "all powers vested by Act No. 248 (Enabling Act) in the three members of the Personnel Board and Personnel Director, including the power to hire, promote, demote, transfer, and remove subordinates as necessary." *(United States v. Jefferson County,* 2:75-CV-666-CLS, Doc. # 935, at 2, 11-12 (N.D.Ala. July 8, 2002); Sims Dep. (*Bowie* case) pp. 35-36; Sims Dep. *(Henry* case) pp. 13-14).

During his tenure as Receiver, Sims transferred employees within the Personnel Board, hired consultants, hired a Deputy Director, hired new employees, terminated employees, and created new teams. (October 10, 2006 Bowie Dep., pp. 15-17, 20-22, 23-24, 38-39; Doc. # 25, Ex. G, pp. 3, 7 & 13).[2] Plaintiff Bowie began working at the Personnel Department on August 10, 1987, and during the relevant time period, he held the position of Senior Personnel Analyst. (October 10, 2006 Bowie Dep., p. 27). Sims made the decision to terminate Bowie's employment from the Personnel Board (Sims Dep. (*Bowie* case) p. 50), and

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2. Although Bowie admits that Sims took those actions while he was Receiver, Bowie nonetheless disputes that Sims "was authorized to take all of these actions **in the manner** that he did." (Doc. # 27, at 3) (emphasis added). As outlined in Section III and particularly Footnote 6 *infra*, Plaintiff's dispute regarding whether Sims was authorized to take those actions in the manner in which he did is not material to the limited issue of Board liability which is the only matter presently before the court.

Bowie was presented a Notice of Position of Elimination on October 31, 2003. (October 10, 2006 Bowie Dep., pp. 170-176, Ex. 15).[3]

On May 20, 2005, Bowie filed a complaint in this court alleging that both the Defendant Board and Defendant Sims (in both his individual and official capacities) denied him promotions, retaliated against him for complaints of discrimination, terminated him, and subjected him to other adverse terms and conditions of employment in violation of Title VII, 42 U.S.C. § 1981, and the Fourteenth Amendment to the United States Constitution (through the vehicle of 42 U.S.C. § 1983). (Doc. # 1). On December 7, 2005, the court dismissed all of Plaintiff's claims against Sims in both of the capacities alleged in the complaint because: (1) the claims against Sims in his official capacity amounted to nothing more than claims against the Board as an entity; and

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3. Again, Bowie's dispute that the termination of his employment was pursuant to *a bona fide* reduction in force is immaterial. Defendant maintains that in addition to Bowie's position, the positions of five other employees were eliminated in 2003 as part of what *was* a reduction in force (October 10, 2006 Bowie Dep., p. 171; Doc. # 25, Ex. G, p. 7), that was necessitated by lack of work for those positions affected and decided after Sims evaluated the workload both at the time of the reduction in force and in the future for those classifications that were eliminated. (Sims Dep. *(Henry* case) p. 48, 62; Doc. # 25, Ex. G, pp. 7-8). In any event, Plaintiff does not dispute that Sims made the decision to eliminate his position; therefore, and any dispute Plaintiff has with the manner in which that decision was made is simply not material to the court's analysis of the *Board's* liability.

(2) Sims was entitled to judicial immunity as to the individual capacity claims based upon Judge Smith's appointment order granting him as Receiver "the status of an officer and agent of this court," and vesting him "with such immunities as by law vest with this court," (July 8, 2002 Order at ¶ 12). (Docs. # 13, 14; October 10, 2006 Bowie Dep., pp. 289-290).

After the court's dismissal of Sims, but before the filing of the Board's motion for summary judgment in this case, the undersigned took under submission a motion for summary judgment filed by the Board in a related case also pending before the court, *Sandra Henry v. Jefferson County Personnel Board*, 2:05-CV-01788-RDP. In *Henry*, plaintiff Sandra Henry, also a former Board employee, brought claims against the Board alone – not against Sims – under the Age Discrimination in Employment Act, 29 U.S.C. § 621 and Alabama's Age Discrimination Act of 1997, Ala. Code § 25-1-20 et seq., alleging that the Board was liable for Sims' decisions to eliminate her positions as part of two separate reductions in force. *(Sandra Henry v. Jefferson County Personnel Board*, 2:05-CV-01788-RDP, Doc. # 1).[4] On August 1, 2006, the Board filed a motion

4. Specifically, Henry alleged that she was effectively demoted twice — when her position as Administrative Coordinator was eliminated as part of a first reduction in force in 2003 and she accepted the position of Examination and Certification Assistant and again in 2004 when her position of Examination of Certification Assistant was eliminated as part of a second reduction in force and she asked to be transferred to the Jefferson County Commission as an Administrative Assistant II. *(Sandra Henry v. Jefferson County Personnel Board*, 2:05-CV-01788-RDP, Doc. # 1).

for summary judgment in *Henry* alleging that it was not liable for employment decisions made by Receiver Sims during his tenure at the Board. *(Sandra Henry v. Jefferson County Personnel Board*, 2:05-CV-01788-RDP, Docs. # 13, 30, 31). By order dated October 11, 2006, the court sought additional briefing in *Henry* on the following issue about which it noted concern: "if, as this court has previously determined, Ronald Sims is due judicial immunity for employment decisions rendered during his tenure as Receiver of the Board *(see Bowie v. Ronald Sims, et al.*, 2:05-CV-1050-RDP, Does. # 13, 14 (N.D.Ala. December 7, 2005)), and if, as Judge Smith's July 8, 2002 Order appointing Sims as Receiver clearly outlines, the Board was stripped of any right to make employment decisions regarding Board members during the time that Sims was Receiver *(see United States v. Jefferson County*, 2:75-CV-666-CLS, Doc. # 935, at 2, 11-12 (N.D.Ala. July 8, 2002)), can the Board be held liable for any employment decisions made by Sims during his tenure?" (Doc. # 24).

In response to the filing of the Board's motion for summary judgment in *Henry* and at the parties' request, on October 19, 2006, the court stayed the proceedings in this case pending the outcome of the potentially dispositive issue of Board liability in the *Henry* case. On February 23, 2007, the court issued a Memorandum Opinion and Order in *Henry* granting the Board's motion for summary judgment and finding that the Board was not liable for the employment decisions made by Sims during his tenure as Receiver:

Appendix B

On July 8, 2002 . . . , Judge Lynwood Smith of the United States District Court for the Northern District of Alabama entered an order appointing Ronald R. Sims, Ph.D., as Receiver of the Board. (United States v. Jefferson County, 2:75-CV-666-CLS, Doc. #935 (N.D.Ala. July 8, 2002) (the "Order" or "Judge Smith's Order"). Pursuant to the Order, Sims received "all powers vested by Act No. 248 (Enabling Act) in the three members of the Personnel Board and Personnel Director, including the power to hire, promote, demote, transfer, and remove subordinates as necessary." (United States v. Jefferson County, 2:75-CV-666-CLS, Doc. #935, at 2, 11-12 (N.D.Ala. July 8, 2002); June 7, 2006 Henry Dep., pp. 17-18). During his tenure as Receiver, Sims transferred employees within the Board, hired consultants, hired a Deputy Director, hired new employees, terminated employees, and created two new departments. (June 7, 2006 Henry Dep., pp. 19, 20, 26, 27).

. . . .

The positions of five other employees – Joyce Smith (51), Barbara Carmichael (45), Darryl Bowie (41), Gregory James (54), and Keisha Cherry (31) – were eliminated by the 2003 RIF. (June 7, 2006 Henry Dep., p. 39; Oliver Aff.). Sims testified he made the decision to

implement a reduction-in-force due to lack of work for those positions affected. (Sims Dep., p. 48). He identified which classifications would be eliminated by evaluating the present workload in addition to anticipating whether future work would exist for those positions. (Sims Dep., p. 62).

. . . .

It is undisputed that Sims, in accordance with Judge Smith's Order, was in fact the sole decision-maker who implemented the decisions about which Plaintiff complains in this case including the reductions-in-force (June 7, 2006 Henry Dep., at pp. 37, 61; Sims Dep., at pp. 48, 97). . . . In fact, Sims was the sole person to implement various organizational changes at the Board including transferring, hiring, and terminating employees, hiring consultants and a Deputy Director, creating new departments and implementing two reductions-in-force (June 7, 2006 Henry Dep., at pp. 18-20, 22-27).

. . . .

Thus, because the Board was prohibited from any participation in the decisions at issue in this case, and because Sims was the only decisionmaker with regard to those decisions, it follows as a matter of law, fact and logic that

the Board cannot be liable for actions that it did not and could not take. . . . It is beyond dispute that Judge Smith's Order vests Sims with "the status of an officer and agent of this Court." and "such immunities as by law vested with this Court." *United States v. Jefferson County*, 2:75-CV-666-CLS, Doc. #935, at 4-6, 13 (N.D.Ala. July 8, 2002). This court recently concluded in the case of *Bowie v. Ronald Sims, et al.*, 2:05-CV-1050-RDP, that Judge Smith's Order bestows upon Sims judicial immunity for employment decisions rendered during his tenure at Receiver of the Board. *See Bowie v. Ronald Sims, et al.*, 2:05-CV-1050- RDP, Docs. #13, 14 (N.D.Ala. December 7, 2005); *see also Carmichael v. Regional Board of Jefferson County*, 2:05-CV-2371-SLB; Doc. #27 at pp. 7-9 (N.D.Ala. September 26, 2006) (Blackburn, C.J.) (holding Sims is due judicial immunity in his individual capacity).

. . . .

The Board is also due the protection of "vicarious immunity" as an extension of the immunity bestowed on Sims by Judge Smith's Order.

(Sandra Henry v. Jefferson County Personnel Board, 2:05-CV-01788-RDP, Doc. # 30 at 3, 7-8, 12, FN9, 13, 14 & 16). Thereafter on March 22, 2007, plaintiff Henry

filed her Notice of Appeal to the Eleventh Circuit challenging the court's summary judgment ruling in favor of the Board in her case. *(Sandra Henry v. Jefferson County Personnel Board,* 2:05-CV-01788-RDP, Doc. # 32).

Given that the issues of Board liability in the instant case are substantially similar to the liability issues already decided by this court in *Henry,* the parties have agreed to seek a ruling from the court regarding Board liability before they even address the merits of Bowie's claims. Defendant's brief notes: "If the [c]ourt finds that the immunity issue in *Henry* is also dispositive in *Bowie,* it is the Personnel Board's understanding that Plaintiff will appeal that decision and seek consolidation of the *Henry* and *Bowie* matters. . . . Accordingly, the Personnel Board does not address the merits of Mr. Bowie's race and retaliation claims, as the immunity issue is dispositive." (Doc. # 24, at 8-9).

III. Applicable Substantive Law and Discussion

As Defendant states in its brief, the only issue before the court on the Board's motion for summary judgment in this case is the Board's "assertion of immunity as a complete defense to the claims levied against it by Plaintiff:"

> The Personnel Board seeks an Order in the instant matter dismissing the Personnel Board based on *immunity* grounds consistent with this [c]ourt's Order and Memorandum Opinion entered in the *Henry* matter on

Appendix B

February 23, 2007.

> Simply put, the Personnel Board is immune from Mr. Bowie's claims as it was stripped of any power or right to affect the terms and conditions of Mr. Bowie's employment while employed at the Personnel Board during the Receivership. Instead, Dr. Sims had the exclusive power and duty to effectuate employment decisions at the Personnel Board during the Receivership.

(Doc. # 24, at 9) (emphasis in original). As the court noted in its summary judgment opinion in the *Henry* case, the answer to the question of Board liability is not only found in the very document that appointed Sims to the position of Receiver, but it is mandated by it. That Order – issued by Judge Smith of this court – makes clear that Sims was the sole party responsible for making employment decisions during the relevant time period, while the Board was stripped of the ability to have any input into (or role in making) those decisions. Thus, the court finds in this case, just as it found in *Henry*, that the Board is not – and cannot be – liable for the employment actions of Sims about which Bowie complains. For the sake of completeness, the court will outline again the basis for its finding below.

First, the court finds that the Board cannot be liable for the actions of Sims as Receiver because the Board had been stripped of any right or ability to make decisions about *any aspect* of Bowie's employment with

the Board during the relevant time period. Here Sims, pursuant to Judge Smith's Order, was vested with "all authority necessary to ensure that the Board fully, faithfully, and lawfully complies in a timely, efficient and cost effective manner and with all functions and obligations required of the Board in terms of the Board's 1981 Consent Decree . . . [including] full power to direct, control, operate, manage, and administer the property, funds, and employees of the Board [and] all powers vested by Act No. 248 in the three members of the Board and Personnel Director, including the power to hire, promote, demote, transfer, and remove subordinates as necessary," and was assigned to "perform the financial, contractual, legal, administrative, personnel duties of the Personnel Director and Personnel Board [including] assess[ing] the present organizational structure of the Personnel Board." *(United States v. Jefferson County,* 2:75-CV-666-CLS, Doc. # 935, at 2, 4-6, 11-12 (N.D.Ala. July 8, 2002). At the same time, Judge Smith's Order makes clear that *the Board itself was divested of all the above-mentioned powers concerning Board employees:* "the members of the Jefferson County Personnel Board shall not perform the foregoing functions" with regard to Board employees. *(United States v. Jefferson County,* 2:75-CV-666-CLS, Doc. # 935, at 11 (N.D.Ala. July 8, 2002).

As a general rule, a corporation cannot be held liable for the acts of a receiver when the corporation had no power to act. *See* 65 Am. Jur. 2d Receivers § 285 (2005); see also *Atlanta, B. & A.R. Co. v. McGill,* 69 So. 874, 874 (Ala. 1915) (holding that a railroad corporation in

receivership as appointed by a federal court did not have control over the acts of a receiver and therefore cannot be held liable for the actions of that receiver and noting it would be "a great injustice . . . to deprive the railroad corporation of the custody and control of its property" and then hold it liable for acts of the receiver and its agents); *Barnett v. Alabama Power Co.*, 104 So. 131 (Ala. 1925) ("[T]he owner who has been dispossessed by a receiver is not liable for the wrongful conduct of the receiver or his servants in the use or operation of the property."). The court acknowledges that these decisions involve an application of state law, but also concludes that the rule of decision on this federal issue should be similarly analyzed and applied. It is undisputed that Sims, in accordance with Judge Smith's Order, was in fact the sole decision-maker who implemented the decisions about which Plaintiff complains in this case. (Doc. # 27, at 3 ¶¶ 12, 13). Thus, because the Board was prohibited from any participation in the decisions at issue in this case, and because Sims was the only decisionmaker with regard to those decisions, it follows as a matter of law, fact and logic that the Board cannot be liable for actions that it did not and could not take.[5]

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5. As in *Henry*, the court notes that it *is perplexed* by Paragraph 12 of Judge Smith's Order, which vests Sims with immunity for employment decisions on the one hand, but then on the other hand requires the Personnel Board and Jefferson County (a non-party here) to indemnify Sims for liabilities, damages, and losses incurred and to pay for all expenses incurred in defending lawsuits or administrative proceedings

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in which Sims is named as a party "if such suit or proceeding is based on or arises out of any action taken within the scope of the Receivership." *(United States v. Jefferson County,* 2:75-CV-666-CLS, Doc. # 935, at 13 (N.D.Ala. July 8, 2002)). The court fails to understand how, in light of the immunity enjoyed by Sims, Sims could undertake any action within the scope of his Receivership that could lead to the assessment of liabilities, damages, or losses for which the Board would need to indemnify him. In fact, the law is clear that judicial immunity renders Sims absolutely immune from any suit – including one for money damages or injunctive/declaratory relief – "for those acts taken while [he was] acting in [his] judicial capacity unless [he] acted in the clear absence of all jurisdiction." *Bolin v. Story,* 225 F.3d 1234, 1239, 1240-42 (11th Cir. 2000). Judicial immunity applies "even when [Sims'] acts are in error, malicious, or were in excess of his [] jurisdiction." *Bolin,* 225 F.3d at 1239, and thus, so long as Sims acted within the scope of his Receivership duties, judicial immunity absolutely prevents the assessment of any liabilities, damages, or losses against him. *Property Management & Investments, Inc. v. Lewis,* 752 F.2d 599, 603-04 (11th Cir. 1985).

Thus, although it simply does not follow that the Board could be required to indemnify Sims for liabilities, damages, and losses arising out of any action taken within the scope of his Receivership, the court must interpret the meaning of Paragraph 12 in light of all its language. Reading Judge Smith's Order as a whole, the most reasonable interpretation of the "indemnity" requirement of Paragraph 12 relates to any liabilities, damages, or losses (and expenses) incurred as a result of the procedure for magistrate judge review of due process allegations, which is set forth and sanctioned by Judge Smith's Order in the paragraph that immediately precedes Paragraph 12. Pursuant to Paragraph 11, Board employees who have been
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Moreover, the court finds, as it did in *Henry*, that based upon the earlier dismissal of Sims as a defendant on the basis of judicial immunity, the Board is also due the protection of "vicarious immunity" under Alabama law as an extension of the immunity bestowed on Sims by Judge Smith's Order. *See Taylor v. City of Mobile*, No. CIV.A. 97-0778-CB-M, 2001 WL 313181 at *1 (S.D. Ala. Mar. 19, 2001) (noting that Alabama courts have extended discretionary function immunity to insulate a municipality or employer from vicarious liability for its agent's actions when the agent is due immunity); *Gore v. City of Hoover*, 559 So. 2d 163, 165-66 (Ala. 1990); *Roden v. White*, 646 So. 2d 605, 611 (Ala. 1994)). Although Bowie focuses the majority of his summary

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subjected to a demotion, suspension, discipline, or termination at the behest of Sims "shall be entitled to a due process hearing before a magistrate judge of this court" and, after a period for objections and appeals, the court "shall enter such orders as may be appropriate." *(United States v. Jefferson County*, 2:75-CV-666-CLS, Doc. # 935, at 11-13 (N.D.Ala. July 8, 2002)). Given that Judge Smith's Order specifically sets forth in Paragraph 11 a process for magistrate judge review of alleged due process violations by Sims, it stands to reason that Paragraph 12's requirement that the Board indemnify Sims for any liabilities, damages, or losses incurred in defending lawsuits or administrative proceedings in which Sims is named as a party refers specifically to those due process hearings. In any event, the language of Paragraph 12 does not provide a separate basis for liability against the Board in this case, especially in light of the Order's clear intention to strip the Board of any right to be involved in employment decisions including the ones about which Plaintiff complains here.

judgment opposition brief on *Sims'* liability, devoting significant time to relitigating the issue of whether Sims is due judicial immunity for the actions taken by him as Receiver (Doc. # 27, at 11-16), this matter was thoroughly argued and analyzed when the court ruled on Defendant Sims' motion to dismiss almost two years ago. (Does. # 13, 14). The court is not inclined to revisit that decision here and incorporates its earlier ruling herein.[6] (Does. # 13, 14). *See also Carmichael v.*

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6. In any event, the court's prior ruling and analysis regarding Sims' motion to dismiss applies with equal force to the current arguments made by Bowie in opposition to the Board's motion for summary judgment, because they are nothing more than a repackaged version of the arguments he made earlier in this case. The court's opinion dismissing Sims *in his individual capacity* because of judicial immunity noted that Judge Smith's Order granted Sims "the status of an officer and agent of this court," vesting him "with such immunities as by law vest with this court" (July 8, 2002 Order at ¶ 12), and found that, given the status bestowed upon Sims by Judge Smith's Order, Eleventh Circuit law makes clear that court-appointed receivers are entitled to judicial immunity to the same degree as the appointing judge including immunity "from damages for those acts taken while they are acting in their judicial capacity unless they acted in the clear absence of all jurisdiction," *Bolin v. Story*, 225 F.3d 1234, 1239, 1240-42 (11th Cir. 2000); *see also Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. 1985) ("[C]ourt-appointed receivers . . . enjoy judicial immunity for acts within the scope of their authority, and that . . . authority extends to carrying out faithfully and carefully the orders of the appointing judge."). Because judicial immunity applies "even when the judge's acts are in error, malicious, or were in excess of his or her

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jurisdiction," *Bolin*, 225 F.3d at 1239; *see also Holmes v. Crosby*, 418 F.3d 1256, 1258 (11th Cir. 2005) (finding that members of parole board and individual parole officers were entitled to absolute judicial immunity from false imprisonment claims, even though revocation of plaintiffs parole was in error), the court rejected Bowie's argument – which he replicates here – that judicial immunity does not apply to Sims because he did not carry out his duties "faithfully and carefully." As the court noted in its motion to dismiss opinion, the Eleventh Circuit has made clear that the *quality* or *efficacy* of the acts is not at issue - the only relevant question is whether the acts performed were within the scope of Sims' authority as Receiver. *See Property Management & Investments, Inc.*, 752 F.2d at 603-04; *Bolin*, 225 F.3d at 1239. Unless Sims acted outside the scope of his appointed jurisdiction – which he clearly did not – judicial immunity applies. *Property Management & Investments, Inc.*, 752 F.2d at 603-04 ("Since nothing in the complaint indicated that [the receiver] had acted outside of his authority and thus was not immune from suit, the district court acted properly when it granted [the receiver's] 12(b)(6) motion to dismiss on grounds of immunity."); *see, e.g., Stump u Sparkman*, 435 U.S. 349, 357 n.7 (1978) ("If a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune").

This time around, Plaintiff tries a different approach – quietly conceding that Sims may bc due judicial immunity for some of the employment decisions he made as Receiver but distinguishing the Sims decisions at issue in this case as "acts that were outside of his Receiver authority" for which no

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immunity is due. Plaintiff contends that Judge Smith "did not give Sims the authority to violate Title VII, including the anti-retaliation provisions of the Title VII" and limited his "authority to hire and eliminate positions" including his authority to implement reductions in force. (Doc. # 27, at 14-15). Even in its repackaged form, Bowie's argument, as before, cuts no ice at all. It is undisputed that Sims was specifically given the "power to hire, promote, demote, transfer, and remove subordinates as necessary." (July 8, 2002 Order at ¶ 2 (footnotes omitted)). To the extent that Plaintiff takes issue with the manner in which Sims made those decisions – i.e., whether those decisions violated Title VII – Plaintiff is merely quarreling with the *quality* of those decisions, which matters not unless the Receiver acted in *clear absence of all jurisdiction.* Here, that is simply not the case. Thus, even if Sims was erroneous or malicious in his decisions, this court cannot strip him of the judicial immunity afforded to him by Judge Smith's Order.

Moreover, as before, Plaintiffs citation to *Forrester v. White,* 484 U.S. 219 (1988), for the argument that Sims was acting administratively and outside of the scope of judicial immunity when making the employment decisions in this case, is inapposite. In *Forrester,* the Supreme Court held that a state court judge who, pursuant to state law, had the authority to hire and fire certain court employees, was not due judicial immunity for any hirings and firings of court personnel that were not tied to any particular case or controversy before him. *Forrester,* 484 U.S. at 230. The court reasoned that those acts were administrative in nature, not judicial, and that therefore judicial immunity did not apply. *Forrester,* 484 U.S. at 230. By contrast in this case, there can be no dispute that Sims' actions were *all* taken pursuant to Judge Smith's Order, which ordered him to perform employment actions including implementing

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Appendix B

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organizational changes like reductions-in-force. In fact, the only reason why Sims had the authority to make employment decisions is because the court bestowed that power upon him and made him an officer of the court. Accordingly, the court sees no basis upon which to reconsider or alter its prior ruling that Sims, as a defendant in his individual capacity, is for the actions about which Plaintiff complains in this case.

Plaintiff also attempts to rely on the theory of "successor liability" to challenge the court's dismissal of Plaintiffs claims against Sims *in his official capacity.* This argument, too, is unpersuasive. The court finds no basis to revisit its decision to dismiss the official capacity claims against Sims as "redundant" claims against the Board as an entity. The law is well settled that "[o]fficial capacity suits are against state agencies, not against the people through whom the agencies act." *Hobbs v. Roberts,* 999 F.2d 1526, 1530 11th Cir. 2005). Plaintiffs argument regarding successor liability – which incorporates the authority of Federal Rule of Civil Procedure 25(d) – misinterprets the court's basis for dismissal of the official capacity claims as "evidence" that the Board is the only party who may be held liable in this case. Plaintiff, however, has confounded two different legal issues – the question of who may be properly named in a complaint and the question of who may be found liable for the actions at issue. Simply because a party is the proper defendant in a case does not mean that party can be held liable. Plaintiffs confusion is evident in this statement from his brief: "In other words, this Court [by dismissing the Sims official capacity claims and finding that the Board is the proper defendant under Rule 25(d)] has found that Sims and the Personnel Board are the same for purposes of this lawsuit . . . . [sic] Even though the Board argues that it should not be held responsible for actions taken while it was not in control." (Doc. # 27, at 9-10). As Defendant points out: "Successor liability

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Appendix B

Regional Board of Jefferson County, 2:05-CV-2371-SLB, Doc. # 27 at pp. 7-8 (N.D. Ala. September 26, 2006) (Blackburn, C.J.) (holding Sims is due judicial immunity in his individual capacity).

Accordingly, having considered all of the parties' arguments, the court finds that only one conclusion can be reached in light of Judge Smith's Order. The Board – which was not only uninvolved in the decisions at issue here, but literally stripped of any right to be involved in those decisions – simply cannot be liable for the actions of the court-appointed Receiver. Put another way, a party who is not permitted to do anything cannot do anything wrong. Whether that lack of liability arises out of the simple fact that the Board had no power to – and did not – take the actions of which Plaintiff complains, or whether the Board, as an extension of Sims' judicial immunity, is due vicarious immunity, there is simply no basis to hold liable an entity that was not responsible for the decisions at issue in this case. As the court has noted repeatedly during the course of both this case and the *Henry* case, the irony of such a result is not lost on this court – the very Order which appointed Sims as Receiver in an attempt to remedy repeated violations of a long-standing Consent Decree (that requires

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does not create a new cause of action against the successor entity, but transfers the liability of the predecessor to the successor .... [S]uccessor liability cannot lie where there is no underlying liability. As this Court [] held Dr. Sims is not liable for Mr. Bowie's claims, the Personnel Board cannot be the successor to liability which does not exist." (Doc. # 29, at 4, 9).

compliance with anti-discrimination laws), may have actually paved the way for (1) Sims to receive immunity and (2) the Board (which had no authority to make any employment decisions regarding Board employees) not to be subject to liability for any discriminatory decisions by Sims (or his subordinates) which Plaintiff contends took place here. Unfortunately, however, the language of Judge Smith's Order and proper interpretation of that language leave no other alternative.

Accordingly, the Board is not liable for the Plaintiffs claims in this case and Defendant's motion for summary judgment is due to be granted.

IV. Conclusion

For all the reasons stated above, the court finds that Defendant's motion for summary judgment is due to be granted. A separate order will be entered.

DONE and **ORDERED** this 29th day of October, 2007.

s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED DECEMBER 7, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DARRYL BOWIE,

Plaintiff,

v.

RONALD SIMS, et al.,

Defendants.

MEMORANDUM OPINION

This case is before the court on Defendant Ronald Sims' Motion to Dismiss (Doc. # 9) filed November 14, 2005. The motion was under submission, without oral argument, as of November 29, 2005. For the reasons outlined below, the court finds that the motion is due to be granted.

I. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A court may dismiss a complaint under Rule 12(b)(6)

only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In deciding a Rule 12(b)(6) motion, the court must "accept all well-pleaded factual allegations in the complaint as true and construe the facts in a light most favorable to the non-moving party." *Dacosta v. Nwachukwa*, 304 F.3d 1045, 1047 (11th Cir. 2002) (citing *GJR Invs., Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1367 (11th Cir. 1998)). "[U]nsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." *Dalrymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003) (citing *Marsh v. Butler County*, 268 F.3d 1014, 1036 n.16 (11th Cir. 2001) (en banc)). Further, "[a] complaint may not be dismissed because the plaintiff's claims do not support the legal theory he relies upon since the court must determine if the allegations provide for relief on *any* possible theory." *Brooks v. Blue Cross & Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (emphasis in original). Nevertheless, conclusory allegations, unwarranted deductions of facts, or legal conclusions masquerading as facts will not prevent dismissal. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002); *see Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003) (" [A] plaintiff must plead specific facts, not mere conclusional allegations, to avoid dismissal for failure to state a claim. We will thus not accept as true conclusory allegations or unwarranted deductions of fact.") (internal citations omitted); *Kirwin v. Price*

Commc'ns. Corp., 274 F. Supp. 2d 1242, 1248 (M.D. Ala. 2003) ("[A]lthough the complaint must be read liberally in favor of the plaintiff, the court may not make liberal inferences beyond what has actually been alleged."), *affd in part*, 391 F.3d 1323 (11th Cir. 2004).

II. Relevant Facts

On July 8, 2002, this Court entered an Order adjudging the Personnel Board of Jefferson County (hereinafter the "Board") in contempt of Court, and appointing Defendant Sims as the Receiver of the Personnel Board. *(See United States v. Jefferson County*, No. CV-75-666 (N.D. Ala., July 8, 2002) (Doc. No. 935) (hereinafter "July 8, 2002 Order")). During his tenure as Receiver, Sims was vested with the powers and duties of the governing officials of the Board. Specifically, Sims was given authority to oversee, among other things, Board employees:

> POWERS OF RECEIVER — The Receiver shall have and exercise all authority necessary to ensure that the Personnel Board fully, faithfully, and lawfully complies in a timely, efficient, and cost-effective manner with all functions and obligations required of the Personnel Board by the terms of the Board's 1981 Consent Decree, as modified by the December 19, 1995 Modification Order, and Act No. 248, 1945 Acts of Alabama, as subsequently amended ("Act No. 248"). To these ends, the powers vested in the Receiver include, but are not limited to, the following:

(a) full power to direct, control, operate, manage, and administer the property, funds, and employees of the Board;

(b) all powers vested by Act No. 248 in the three members of the Personnel Board and Personnel Director, including the power to hire, promote, demote, transfer, and remove subordinates as necessary. . . .

(July 8, 2002 Order at ¶ 2 (footnotes omitted)). The duties assigned to Sims as Receiver included the following:

DUTIES OF RECEIVER — The Receiver shall perform the financial, contractual, legal, administrative, and personnel duties of the Personnel Director and Personnel Board. These duties include, but are not limited to, the following:

(a) preserve, protect, and administer all property, assets, and employees of the Board;

. . .

(g) assess the present organizational structure ofthe Personnel Board, and design appropriate infrastructures, systems, and procedures that will institutionalize the ability to perform all functions — and particularly the function so of developing and administering

> lawful selection procedures for hiring and promotion in the classified services of the county, municipalities, and appointing authorities served by the Board — in an efficient, professional, and cost-effective manner
>
> . . .
>
> (k) perform all other acts necessary to transform the Personnel Board into a strong and competent civil service agency with a clearly defined mission, the infrastructure, systems, and skills to support that mission, and, an agency that discharges all functions in an efficient, professional, and cost-effective manner in substantial compliance with all applicable federal and state laws and regulations

(July 8, 2002 Order at ¶ 3 (footnotes omitted)). Sims ceased exercising control over the Board on or around July 11, 2005. These powers have been returned to the local authorities from which they were taken. (*See United States v. Jefferson County*, No. CV-75-666 Second Revised Transition Plan at 13-16)(hereinafter "Transition Plan")).

On May 20, 2005, Plaintiff filed a complaint in this court alleging that the Board, and specifically Ronald Sims as Receiver, denied him promotions, retaliated against him for complaints of discrimination, terminated

him, and subjected him to other adverse terms and conditions of employment in violation of Title VII, 42 U.S.C. § 1981, and the Fourteenth Amendment to the United States Constitution (through the vehicle of 42 U.S.C. § 1983). (Doc. # 1). Sims is sued in both his individual capacity and his official capacity as Receiver for the Board.

III. Discussion

Sims argues that Plaintiff's claims against him in both his official and individual capacities are due to be dismissed. The court agrees for the following reasons.

A. Official Capacity Claims

The court finds that Plaintiff's claims against Sims in his official capacity are due to be dismissed because they amount to nothing more than claims against the Board as an entity. The law is well settled that "[o]fficial capacities suits are suits against state agencies, not against the people through whom agencies act." *Hobbs v. Roberts*, 999 F.2d 1526, 1530 (11th Cir. 1993); *see also Scott v. Taylor*, 405 F.3d 1251, 1254 (11th Cir. 2005) (noting that "[a]n official capacity suit against a government official is generally treated as a suit against the underlying government entity. . . ."). Plaintiff's claims against both Sims in his official capacity and the Personnel Board as an entity are redundant. "To impose official liability on a government entity amendable to suit, a plaintiff need do no more than name the government entity defendant; it is unnecessary also to name specific agents." *Hobbs*, *999* F.2d at 1530.

Appendix C

Plaintiff's argument that Sims is a necessary party to the litigation because he was sued in his "official capacity as the Receiver of the Personnel Board," or as "Agent of the Court," is nothing more than a semantic squabble. (Plaintiff's Opposition at 1-2). Plaintiff attempts to create a distinction where none exists. This court made clear that Sims as Receiver "assumed the powers previously held by both the Personnel Director and three-member Personnel Board" and therefore "stepped into the shoes" of the Personnel Director and "exercis[ed] the authority of the three-member Board." *(Bowie v. Personnel Board of Jefferson County*, MC-03-RRA-2162-S (Doc. # 41, at 6, 8, 30 (November 8, 2005)). The parties do not dispute that Sims was "operating and managing the Personnel Board," (Plaintiff's Opposition at 3-4), when he allegedly performed the acts about which Plaintiff complains. Thus, there is no distinction between Sims as "Receiver," Sims as "Agent of the Court," and Sims as "the Board."

Moreover, Sims is no longer the Receiver of the Board — all of the powers he exercised in his day-to-day oversight of the Board, including the power to defend lawsuits, have been restored to the three members charged under Alabama state law with control of the Board. (Transition Plan at 13-16). Under Federal Rule of Civil Procedure 25(d), "[w]hen a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25(d). Therefore, the Board — and not Sims in his official capacity - is the proper defendant in this case.

Appendix C

B. Individual Capacity Claims

Plaintiffs claims against Sims in his individual capacity are also due to be dismissed. As a threshold matter, the court notes that Plaintiff cannot maintain his Title VII discrimination and retaliation claims against Sims because "Title VII actions are not appropriately brought against government officials in their personal capacities. Such suits may be brought only against individuals in their official capacity and/or the employing unit." *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1060 (11th Cir. 1992); *see also Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) ("The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act.").

As to Plaintiff's other claims against Sims in his individual capacity, Sims argues, and the court agrees, that he is due judicial immunity. This court's appointment order granted Sims "the status of an officer and agent of this court," and vested him "with such immunities as by law vest with this court." (July 8, 2002 Order at ¶ 12). Eleventh Circuit law makes clear that court-appointed receivers are entitled to judicial immunity to the same degree as the appointing judge. *See, e.g., Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. 1985) ("[C]ourt-appointed receivers . . . enjoy judicial immunity for acts within the scope of their authority, and that . . . authority extends to carrying out faithfully and carefully the orders of the appointing judge.").

Appendix C

Judicial immunity renders the officer absolutely immune from any suit — including one for money damages or injunctive/declaratory relief — arising out of the performance of his or her official duties: "Judges are entitled to absolute judicial immunity from damages for those acts taken while they are acting in their judicial capacity unless they acted in the clear absence of all jurisdiction." *Bolin v. Story*, 225 F.3d 1234, 1239, 1240-42 (11th Cir. 2000). Judicial immunity applies "even when the judge's acts are in error, malicious, or were in excess of his or her jurisdiction." *Bolin*, 225 F.3d at 1239; *see also Holmes v. Crosby*, 418 F.3d 1256, 1258 (11th Cir. 2005) (finding that members of parole board and individual parole officers were entitled to absolute judicial immunity from false imprisonment claims, even though revocation of plaintiff's parole was in error).

Plaintiff's argument that judicial immunity does not apply because Sims did not carry out his duties "faithfully and carefully" (Plaintiff's Opposition at 4) misses the mark. As noted above, the Eleventh Circuit has made clear that the *quality* or *efficacy* of the acts is not at issue — the only relevant question is whether the acts performed were within the scope of Sims' authority as Receiver. See *Property Management & Investments, Inc.*, 752 F.2d at 603-04; *Bolin*, 225 F.3d at 1239. Whether Sims' actions were erroneous, malicious, or discriminatory does not factor into the analysis. Unless Sims acted outside the scope of his appointed jurisdiction, judicial immunity applies. *Property Management & Investments, Inc.*, 752 F.2d at 603-04 ("Since nothing in the complaint indicated that [the receiver] had acted outside of his authority and thus was not immune from suit, the district court acted

properly when it granted [the receiver's] 12(b)(6) motion to dismiss on grounds of immunity."); *see, e.g., Stump v. Sparkman*, 435 U.S. 349, 357 n.7 (1978)("If a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune").

In this case there is no dispute that Sims was acting within the scope of his authority as Receiver of the Board when he allegedly discriminated and retaliated against Plaintiff with regard to employment decisions. Sims was specifically given the "power to hire, promote, demote, transfer, and remove subordinates as necessary." (July 8, 2002, Order at ¶ 2 (footnotes omitted)). Accordingly, Sims is due judicial immunity from Plaintiff's claims against him in his individual capacity.

IV. Conclusion

For the reasons stated above, Defendant's motion to dismiss is due to be granted. A separate order granting that motion and dismissing the claims against Defendant Sims will be entered.

DONE and **ORDERED** this 7th day of December, 2005.

s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 11, 2008

IN THE UNITED STATES COURT OF FOR THE ELEVENTH CIRCUIT

No. 07-15267-DD

DARRYL BOWIE,

Plaintiff-Appellant,

versus

RONALD SIMS, individually and in his official capacity as the Receiver for the Personnel Board of Jefferson County, PERSONNEL BOARD OF JEFFERSON COUNTY,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, HULL and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

Appendix D

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX E — RELEVANT STATUTES

42 U.S.C.A. § 2000e

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Appendix E

42 U.S.C.A. § 2000e-3

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * * *

No. 08-488

Supreme Court, U.S.
FILED
NOV 14 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DARRYL BOWIE,

Petitioner,

v.

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA and RONALD SIMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA

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QUESTIONS PRESENTED

A. Does Fed. R. Civ. P. 25(d), which mandates the substitution of a party for a public official who ceases to hold office, have any bearing on the ultimate issue of liability?

B. Can the Personnel Board be held liable through the doctrine of successor liability where the court appointed Receiver is entitled to judicial immunity and therefore is not liable?

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STATEMENT OF CASE

On July 8, 2002, Judge Lynwood Smith of the United States District Court for the Northern District of Alabama entered an Order in *United States v. Jefferson County*, 2:75-CV-666-CLS, Doc. #935 (N.D. Ala. July 8, 2002) appointing Ronald R. Sims, Ph.D. ("Sims") as Receiver of the Personnel Board of Jefferson County, Alabama (the "Order" or "Judge Smith's Order"). In addition to affording Sims "all powers vested by Act No. 248 (Enabling Act) in the three members of the Personnel Board and Personnel Director, including the power to hire, promote, demote, transfer, and remove subordinates as necessary . . ." the Order granted Sims "the status of an officer and agent of this court," and vested him, "with such immunities as by law vest with this Court." (Pet. App. B, pp. 11a, 13a).

Pursuant to the Order, the Personnel Board had no authority or control over the actions of Sims during the period of the receivership, including over the termination of Petitioner pursuant to a Reduction in Force in October 31, 2003. Petitioner filed the present action on May 20, 2005 in the District Court of the Northern District of Alabama, with Judge David Proctor presiding. The Petitioner asserted claims against Sims and the Board, alleging violations of Title VII, 42 U.S.C. § 1981, and the Fourteenth Amendment to the United States Constitution.

The Personnel Board subsequently resumed control over its operations on July 11, 2005, after the onset of this litigation. On November 14, 2005, Sims filed a motion to dismiss, asserting that he was entitled to judicial

immunity for action taken in the scope of his receivership, and that the Personnel Board was the proper defendant because he was no longer serving as Receiver. The Motion was granted on December 7, 2005, on the basis that Sims was entitled to judicial immunity and the claim against Sims in his official capacity were properly asserted against the Personnel Board.

Concurrently with this case, a substantially similar case was also pending before Judge Proctor, *Henry v. Jefferson County Personnel Board*, 2:05-CV-01788-RDP, wherein the plaintiff asserted age discrimination against the Personnel Board for her dismissal during the Receivership. The counsel for both the Personnel Board and the plaintiff was the same in *Henry* and the present case.

After the dismissal of Sims in this case, Judge Proctor heard a motion for summary judgment in *Henry*, filed by the Personnel Board, arguing that the Personnel Board could not be held liable for the acts of the Receiver. The District Court, at both parties request, stayed this proceeding pending the resolution of this potentially dispositive issue in *Henry*. On February 23, 2007, the District Court entered an Order in *Henry*, holding that the Personnel Board did not have the authority to make personnel decisions pursuant to Judge Smith's July 2002 Order, and that the Personnel Board is entitled to protection under the doctrine of "vicarious immunity," as a result of the judicial immunity afforded Sims. The Plaintiff in *Henry* appealed the District Court's decision to the 11th Circuit Court of Appeals ("11th Circuit"), and the decision was affirmed.

On April 6, 2007, in this case, the Personnel Board filed a Motion for Summary Judgment in the District Court, solely on the issue of whether the Personnel Board was entitled to immunity as it was stripped of the authority to make personnel decisions and is entitled to vicarious immunity, consistent with the 11th Circuit's decision in *Henry*. The District Court granted summary judgment on October 29, 2007, and that Order was affirmed by the 11th Circuit on May 13, 2008, and on July 11, 2008, the Petitioner's Petition for Rehearing En Banc was denied.

SUMMARY OF THE ARGUMENT

The Petitioner argues in his Petition for a Writ of Certiorari the District Court erred by declining to follow Fed. R. Civ. P. 25(d), and this failure conflicted with decisions of this Court and rulings of the Circuit Courts. This Court should decline to grant this petition, because the Petitioner has completely misstated the District Court's holding below. Rather than declining to follow Fed. R. Civ. P. 25(d), the District Court dismissed the Receiver from the action, and held that the Board was the proper party, expressly on the basis of Fed. R. Civ. P. 25(d). As he did below, the Petitioner is conflating the distinct legal concepts of the ability to be sued and liability. The District Court determined that the Personnel Board was the proper party to be sued pursuant to Rule 25(d). However, the District Court granted summary judgment for the Personnel Board based on the lack of liability. The Petitioner is attempting to create a conflict where none exists, through a mischaracterization of the District Court's opinion, and the Petition should not be granted.

Furthermore, the Petitioner's argument relating to the doctrine of successor liability ignores the dispositive issue in this case, the judicial immunity of the Receiver and the doctrine of vicarious liability. The District Court previously found the Receiver was entitled to judicial immunity based on Judge Smith's Order. In granting summary judgment, the District Court held that the Personnel Board was entitled to vicarious immunity. The vicarious immunity of the Personnel Board defeats the Petitioner's argument regarding successor liability, even if it were applicable. For this reason, the petition should not be granted.

The Petitioner finally contends the petition should be granted because the District Court's Order effectively deprived Personnel Board employees of Title VII protection during the scope of the receivership. This contention is misplaced. The District Court lacked the authority to rewrite the Judge Smith's Order, and was therefore bound to enforce the judicial immunity afforded to Sims in that Order. The proper forum to challenge Sims' judicial immunity was with the court that appointed Sims as the Receiver. The Petitioner failed to do so, and therefore cannot challenge the District Court's decision on this ground.

REASONS FOR DENYING THE PETITION

A. This Petition Should Not Be Granted Because The Petitioner Misstates The District Courts Holding Regarding Substitution of Parties, and Has Failed to Identify a Conflict Between the Circuit Courts and the District Court's Decision.

The Petitioner's primary argument for the granting of the writ is that the District Court's Order, and subsequent 11th Circuit affirmance, conflicts with holdings of this Court and the holdings of Circuit Courts in regards to the application of Fed. R. Civ. 25(d). The alleged conflict is based on his contention that the District Court declined to substitute the Personnel Board as the successor of the Receiver, as required by Fed. R. Civ. 25(d). In this, the Petitioner misstates the District Court's holdings, and misconstrues the effect of Rule 25(d) on the present action. The Court should decline to grant the petition, because the Petitioner has failed to show any conflict with prior decisions of this Court, or any other court, and has not presented a proper question for review.

As the Petitioner acknowledges, the District Court expressly referenced Fed. R. Civ. P. 25(d) in its Order dismissing Sims, the Receiver, from this suit. The court noted that, at the time of the motion to dismiss, all of the powers exercised by Sims as the Receiver had reverted back to the Personnel Board. Therefore, the court reasoned that, under Fed. R. Civ. P. 25(d), "the Board – and not Sims in his official capacity – is the proper defendant in this case." (Pet. App. B, p. 32a). Contrary to the Petitioner's contention that the District

Court declined to follow Fed. R. Civ. P. 25(d), the District Court expressly used that rule to dismiss Sims in his official capacity.

Despite this, the Petitioner attempts to show a conflict between the District Court's decision and this Court and the federal circuits, by citing thirteen (13) cases which applied Fed. R. Civ. P. 25(d). As the District Court actually applied Rule 25, in the same manner as those cited cases, the allegation of a conflict is misplaced. It is true that the practical effect of the decision by the District Court and the decisions cited by the Petitioner was different. The substituted parties in all of the cited cases were not previously involved in the litigation, and therefore needed to be added as a party pursuant to Fed. R. Civ. P. 25(d). In contrast, the Board was already a party to this litigation, and therefore the posture of the case was unchanged. However, that it is a distinction without a difference. The import of the rule, as explained by the Petitioner, "is to avoid abatement of actions against officials when they are replaced in office." (Petition, p 8). By properly substituting the Personnel Board as the proper defendant regarding the claims against Sims in his official capacity, the District Court ensured the Petitioner would have an opportunity to continue his claims against the Personnel Board. The mere fact that the Petitioner's claims against the Personnel Board failed on their merits, does not indicate that his cause of action against the Personnel Board abated.

In this respect, the Petitioner's argument evidences a misunderstanding of the effect of Fed. R. Civ. P. 25(d). The Petitioner contends that the District Court failed

to substitute the Board as the proper party *because* the District Court ultimately found that the Board could not be held liable. This is made evident in the Petitioner's statement

> "[a]lthough the district court did not explicitly give a reason for declining to follow the mandates of Rule 25(d), the reason seems to be its opinion that 'the Board cannot be liable for the actions of Sims as receiver because the Board has been stripped of any right or ability to make decisions.'"

(Petition, p. 9). As the District Court explained, the "[Petitioner] has compounded two different legal issues – the question of who may be properly named in a suit and who may be found liable." (Pet. App. B, p. 23a). The District Court, in concluding the Personnel Board could not be held liable for the acts of the Receiver, was not declining to substitute the Personnel Board as the proper party, but was instead making a proper determination of the issue of liability. In so doing, the District Court without question followed the proper procedure, by first finding the Personnel Board was the *proper party* under Rule 25(d), and then making a determination the Personnel Board was not liable for various reasons.

The fact that Rule 25(d) has no bearing on the ultimate question of liability can be demonstrated through the cases cited by the Petitioner. The common thread in all of those cases is that the courts automatically substituted the proper party, often either in a footnote or in the case style itself, and then

proceeded through a thorough analysis on the issue of liability, without reference to Rule 25(d). The District Court in the present case proceeded through the identical analysis, by first finding the Personnel Board was the proper party in regards to the claims against Sims in his official capacity, and then proceeding to conduct an analysis of the Personnel Board's liability. There is no conflict between the District Court's decision and the cases cited by the Petitioner, and instead complete unanimity. Therefore, the Petitioner has failed to provide a compelling reason for this Court to grant the petition.

B. This Petition Should Not Be Granted Because the Petitioner Has Failed to Identify a Conflict Between this Court, the Circuit Courts and the District Court's Decision And The Judicial Immunity Afforded the Receiver By Judge Smith's Order Forecloses the Application of Successor Liability.

The Petitioner also contends that the District Court failed to apply the doctrine of successor liability, in conflict with several decisions of this Court and the Circuit Courts.[1] In this, the Petitioner again misstates that grounds for the District Court's decision, and further ignores the dispositive issue in this case.

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[1] The Petitioner treats his argument regarding Fed. R. Civ. P. 25(d) and his argument regarding successor liability as one in the same, further illustrating his misunderstanding of the effect of Rule 25(d). Successor liability deals with the liability of the Board, while, Rule 25(d) only addresses the substitution of the proper party. As the two are separate and distinct concepts, they will be addressed separately.

The District Court was correct in holding that the doctrine of successor liability is inapplicable in this case, and that decision did not conflict with any other decision from this, or any other Court. Therefore this Court should not grant this petition.

In support of his contention that the District Court erred by failing to apply the doctrine of successor liability, the Petitioner cites several decisions, both from this Court, and the Circuit Courts, which he contends mandate the application of the successor liability doctrine in the present case. However, none of the cases actually stand for the proposition that the successor liability doctrine is applicable to the situation presented here. Moreover, the absence of liability on the part of Sims, pursuant to his judicial immunity, renders all of the cases factually distinguishable and therefore inapposite.

This Court's decision in *Texas and Pacific Railway Co. v. Johnson*, 151 U.S. 81, 141 S.Ct. 250, 38 L.Ed. 81 (1894) is cited by the Petitioner for the proposition that a plaintiff can pursue a claim against the successor in interest to a Receiver. In *Johnson*, the plaintiff brought a claim in Texas state court against a railroad company for a tort that occurred while the railroad was in a receivership. This Court, on review from the Texas Supreme Court, held that "as respects the contention for the railway company that a personal judgment could not be rendered against it because it was not liable for acts of negligence committed by the receiver, that was a question of general law and for the state court to pass upon." *Id.* at 255. Rather than providing a rule that a successor must be held liable for the acts of the receiver,

the *Johnson* Court declined to reverse a state supreme court on a state law issue. This case is not informative in any way of the issues presently before this Court.

Similarly, *Rowser v. Miller*, 631 F.2d 433 (6th Cir. 1980), also cited by the Petitioner, fails to give support for the Petitioner's proposition. In *Rowser*, the 6th Circuit Court of Appeals reviewed a district court's dismissal of an action, alleging racial discrimination on the part of a hotel's receiver, on the ground that the claims were frivolous. During the pendency of the appeal, the receivership was dissolved, and the receiver argued that the case was now moot. The Court in *Rowser* reversed the District Court's determination that the claim was frivolous, noting the severity of the allegation. The court noted that "[i]t is not clear, however, whether the termination of a receivership altogether precludes further recourse on claims arising during the receivership." *Id.* at 434. The court remanded the case for further proceedings to resolve that question. This case does not support the proposition that successor liability applies when a receivership dissolves.

None of the other cases cited by the Petitioner even address the applicability of the successor liability doctrine to the dissolution of the receiver, and instead deal with the unrelated issue arising when the successor company buys the assets of the predecessor and continues its operations. See *EEOC v. MacMillan Bloedel Containers, Inc.* 503 F.2d 1086 (6th Cir. 1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973); *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974); *Trujillo v. Longhorn*

Mfg. Co., 694 F.2d 221 (10th Cir. 1982); *Dominguez v. Hotel, Motel, Restaurant & Miscellaneous Bartenders Union*, 674 F.2d 732 (8th Cir. 1982). These cases are therefore inapplicable to the present action, where the actions were taken by a Court appointed Receiver, who subsequently returned control back to the Personnel Board. As none of the cases cited present any conflict with the District Court's opinion, the Petition should not be granted.

Moreover, none of the cases Petitioner cites address the dispositive issue of this case, which is the judicial immunity granted to Sims by Judge Smith's Order. The Order appointing Sims as Receiver of the Personnel Board granted Sims "the status of an officer and agent of this Court," and vested him "with such immunities as by law vested with this Court." (Pet. App. B, p. 13a). Thus, under the Order, Sims was afforded absolute judicial immunity for his decisions made in the scope of his Receivership. The District Court, in dismissing Sims from the Petitioner's lawsuit, noted that "[u]nless Sims acted outside the scope of his appointed jurisdiction, judicial immunity applies." (Pet. App. C, p. 34a). The liability of the predecessor in all of the cases cited by the Petitioner had yet to be determined. The District Court in the present case conclusively established that Sims was immune from the suit.

In addressing the Petitioner's argument regarding successor liability, the District Court noted the effect of its previous finding of Sim's judicial immunity; "Successor liability cannot lie where there is no underlying liability. As this Court has previously found Dr. Sims is not liable for Mr. Bowie's claims, the

Personnel Board cannot be the successor to liability which does not exist." (Pet. App. B, p. 24a). Thus, even if those cases stood for the proposition for which they are cited, they are all readily distinguishable, as the judicial immunity of Sims foreclosed the application of the successor liability doctrine. Because the Petitioner has failed to identify any authority with which the District Court's decision conflicts, the Petition should be denied.

C. The Petition Should Not Be Granted Because The District Court Based its Decision in Part on the Adequate and Independent State Law Ground of Vicarious Immunity.

The Petitioner contends the District Court based its decision on the ground that "the Board cannot be held liable for the actions of Sims a receiver because the Board has been stripped of any right or ability to make decisions." (Petition, p. 9). However, that was only one of the grounds the District Court relied upon to hold the Personnel Board was not liable for the acts of the Receiver. As a separate adequate and independent ground, the District Court also held that "the Board is also due the protection of 'vicarious immunity' under Alabama law as an extension of the immunity bestowed on Sims by Judge Smith's Order." (Pet. App. B, p. 19a).

The District Court made clear this was a separate and sufficient ground for granting summary judgment, when it stated "whether that lack of liability arises out of the simple fact that the Board had no power to – and did not – take the actions of which the Plaintiff complains, or whether the Board, as an extension of

Sims' judicial immunity, is due vicarious immunity, there is simply no basis to hold liable and entity that was not responsible for the decisions at issue in this case." (Pet. App. B, p. 24a). Because the District Court also based its decision on application of an adequate and independent state law ground, this Court should decline to grant the Petition. See *City of Mesquite v. Aladdin's Castle Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (declining to reach decision on federal issue because Texas law might provide adequate and independent support for the judgment of the Court of Appeals.)

D. The Petitioner's Argument Asserting the District Court Deprivated the Petitioner Of Title VII Protection Is In Effect An Argument That A Court Appointed Receiver Is Not Entitled To Judicial Immunity, And As Such, Conflicts With Over A Century Of Precedent And Was Not Brought In The Correct Forum.

Petitioner's final argument to this Court is that the practical effect of the District Court's Order was to deprive the employees of the Personnel Board of Title VII protection during the course of the Receivership, and therefore this case "presents an issue of great national importance." (Petition, p. 21) However, as previously established, the grant of judicial immunity to Sims as Receiver mandated the District Court's decision, and the District Court was bound to enforce Judge Smith's Order as it was written. In effect, by asking this Court to reverse the District Court, the Petitioner is asking this Court to reverse the appointing court's grant of judicial immunity to a court appointed

receiver, and by doing so, overturn a number of substantially similar Circuit Court precedents.

Nearly all of the Circuits acknowledge that a court appointed receiver is entitled to judicial immunity. *Property Management Investments, Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. Fla. 1985) (affirming dismissal of Receiver on the ground of judicial immunity); *NPF IV, Inc. v. Servicemaster Diversified Health Servs., L.P.*, 181 F.3d 102 (6th Cir. 1999) (affirming dismissal of Receiver on ground of judicial immunity); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1301 (9th Cir. 1989) (finding that "absolute derivative judicial immunity is appropriate" for court appointed receivers); *Bradford Audio Corp. v. Pious*, 392 F.2d 67, 71 (2d Cir. N.Y. 1968) ("A court appointed receiver is a quasi-judicial officer within the protection of the immunity.") *Davis v. Bayless, Bayless & Stokes*, 70 F.3d 367, 373 (5th Cir. Tex. 1995) ("Court appointed receivers act as arms of the court and are entitled to share the appointing judge's absolute immunity") *T & W Inv. Co. v. Kurtz*, 588 F.2d 801, 802 (10th Cir. Okla. 1978) ("The courts that have considered the matter have held that a receiver is a court officer who shares the judge's immunity.") *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. P.R. 1976) ("At the least, a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity.") Clearly, the concept of a court appointed receiver receiving judicial immunity is not novel. The Petition, a request for the Court to upend a rule of law consistently applied in nearly all of the Circuits, should therefore not be granted.

Finally, the proper forum in which to challenge the actions of the Receiver, and whether the Receiver exceeded his grant of authority, is with the Judge Smith, the appointing judge. In *New Alaska Dev. Corp.*, *supra*, the 9th Circuit Court of Appeals held, in regard to issues of whether a Receiver was negligent in his management, the Petitioner should have addressed those issues with the appointing judge. The court noted that "it constitutes a waste of precious judicial and party resources to pursue matters such as these in a collateral proceeding, rather than before the judge who appointed the receiver." In the related context of a bankruptcy receiver, the court in *In re Sundance Corp.*, 149 B.R. 641, 648 (Bankr. E.D. Wash. 1993), similarly queried "Who better can determine if a receiver acted beyond the scope of its authority than the court that granted that authority?" Rather than challenging the Receiver's action and the scope of his authority with the appointing judge, the Petitioner in effect asked the District Court to rewrite the appointment order, eliminating the Receiver's judicial immunity, which the District Court lacked the authority to do.

CONCLUSION

The Petitioner's attempts to provide a compelling reason for the grant of its Petition for Writ of Certiorari all fail. The Petitioner has not shown that there exists any conflict between the decision of the District Court, and its affirmance by the 11th Circuit. In fact, the District Court's decision is in complete accord with all of the cases cited by the Petitioner. Furthermore, the Petitioner misrepresents the holding of the District Court in his petition, and ignores the dispositive issue of the case. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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